86 1548

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD R. LA CROIX, SR.
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel of Record

LA CROIX, SCHUMB,
SANGUINETTI & KELLER
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel for Petitioner

55 pp

No. ____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD R. LA CROIX, SR.
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel of Record

LA CROIX, SCHUMB,
SANGUINETTI & KELLER
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel for Petitioner

QUESTIONS PRESENTED

1. Are "make whole" orders of the National Labor Relations Board extended to nonunion employees employed after expiration of the collective bargaining agreement in excess of the remedial authority conferred by the Board by Section 10(c) of the National Labor Relations Act?

2. Are "make whole" orders of the Board by which the employer is required to make backpay payments to employees and benefits payments to the union trust funds for nonunion employees who may never receive any benefits therefrom impermissibly penal and confiscatory and, therefore, not made to effectuate the objectives of the National Labor Relations Act?

3. Are orders of the Board which require nonunion employees hired after expiration of the collective bargaining

agreement to join a closed shop employer or to lose their jobs void orders where such orders deny such class of employees of their due process and equal protection of the laws rights?

4. Has the Board, in applying and extending the provisions of Section 10(c) of the National Labor Relations Act to nonunion employees hired after the expiration of a collective bargaining agreement, grafted a new and different class of employees not intended to be covered by the Congress and has, therefore, legislated and usurped Congressional authority?

5. Has the Board, in denying the current nonunion employees hired after the expiration of the collective bargaining agreement any choice other than to join a closed shop employer or to be terminated, violated sections 7, 8 and 9 and other provisions of the National

Labor Relations Act under which the employees' freedom of choice in the formation and participation of unions is granted?

LIST OF PARTIES

The parties to the proceedings below in the United States Court of Appeals were petitioner Peterson Painting, Inc., and the respondent National Labor Relations Board.

The parties to the proceedings before the National Labor Relations Board were petitioner Peterson Painting, Inc., and charging party District Council of Painters No. 33, International Brotherhood of Painters and Allied Workers.

Petitioner Peterson Painting, Inc., has no parent companies, subsidiaries or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

PETERSON PAINTING, INC., Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Peterson Painting, Inc., respectfully prays that a Writ of Certiorari be issued to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above proceeding on November 14, 1986, as modified by Amended Memorandum of November 28, 1986, to delete from the original Judgment the words "argued and," and the Judgment of that court denying petitioner's Petition for Rehearing on December 17, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is an unpublished opinion reported only "as order enforced" at 804 F2d 1253. The text of the Court's Decision appears in the Appendix hereto, page 1a, infra.

The Decision of the National Labor Relations Board is reported as 277 NLRB 103 in C.C.H. NLRB Decisions, 1985. The text of the Decision of the Board appears in the Appendix hereto.

The Court of Appeals' Judgment denying Peterson Painting's Petition for Rehearing appears in the Appendix hereto.

JURISDICTION

The National Labor Relations Board had jurisdiction over the proceedings before it under Section 10(c) of the National Labor Relations Act, as amended, (29 U.S.C. 160 (c)) which vests the Board

with jurisdiction to issue orders remedying unfair labor practices. The Administrative Law Judge issued its Order and Decision on December 6, 1984, and petitioner timely filed his exceptions to his Decision and Order and a brief in support of his exceptions. General counsel for the Board and District Counsel of Painters No. 33, International Brotherhood of Painters and Allied Workers, filed briefs with the Board in support of the Administrative Law Judge's Decision. On November 29, 1985, the Board affirmed the Order and Decision of the Administrative Law Judge. On December 24, 1985, petitioner filed his Petition for Review with the Court of Appeals under 29 U.S.C. 160(c) and (f) to set aside or modify the Board's orders. Thereafter, the Board filed its cross-petition for enforcement of the Board's orders under 29 U.S.C. 160(e).

The Court of Appeals had jurisdiction to review, modify or set aside the Order of the Board under 29 U.S.C. 160(f).

The jurisdiction of this court to review the Judgment of the Ninth Circuit is invoked under 28 U.S.C. Section 1254(1) which provides that the Supreme Court may review cases in the Federal Courts of Appeal by Writ of Certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of the judgment or decree.

STATUTE INVOLVED

Section 10(c) of the Act (29 U.S.C. 160(c)) provides that the Board, upon finding of an unfair labor practice by a person, to state its findings of fact and to issue an order requiring such person to cease and desist from such unlawful labor practice, and to take such

affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.

STATEMENT OF THE CASE

Petitioner Peterson Painting, Inc., is a California corporation engaged in the business of residential painting and Victor Peterson is the president of the corporation. Victor commenced business as Victor Peterson Painting in 1971 as a sole proprietorship until 1975 when he incorporated the business. In 1971 the company became a member of the Painting and Decorating Contractors Association of Central Coast Counties (PDCA), a multi-

employer association to whom he had given authorization to bargain collectively. By virtue of his membership in PDCA, petitioner was a party to a series of successive collective bargaining agreements with District Council 33 of the Brotherhood of Painters and Allied Trades, the most recent being effective from July 1, 1980 through June 30, 1983. Article 25 of the Agreement provided that the Agreement be in effect through June 30, 1983, and remain in effect from year to year thereafter, unless either party shall give notice to the other in writing of their desire to change or revise the agreement and that such written notice be presented to the other party not less than 120 days prior to the expiration date. Because of poor economic conditions in the fall of 1982, the union ordered to begin negotiations early for a new PDCA agreement. PDCA

members who did not want to be bound by a successor agreement were privileged to withdraw from the Association prior to the conclusion of the early negotiations. In accordance with his right under Article 25, petitioner informed the union in writing on December 8, 1982, that he withdrew bargaining authority of the PDCA for petitioner and that petitioner would not be bound by the 1980-1983 agreement past its expiration date of June 30, 1983. It is admitted that petitioner timely withdrew from the PDCA in accordance with Article 25 and that he was not bound by the new agreement. By letter dated January 24, 1983, petitioner again informed the union that he had withdrawn bargaining authority from the PDCA and that petitioner would not be bound by the 1980-1983 agreement past its expiration date of June 30, 1983. After petitioner sent his second letter, the

union wrote to petitioner on February 3, 1983, advising him that he was bound by the old contract through June 30, 1983, and was required to make the cost of living increases that became effective on January 1, 1983, until the contract expired. The union letter did not tell the petitioner that he could be held to the terms of the 1980-1983 agreement past its June 30, 1983 expiration date. The union letter did, however, request that petitioner contact the union to bargain for a new contract governing Peterson Painting, Inc. When petitioner did not respond to the union letter, the union on June 8, 1983, wrote petitioner indicating its willness to bargain with it for a new agreement. Again, this letter did not advise petitioner that it could be held to the terms of the 1980-1983 agreement past its June 30, 1983 expiration date.

On June 29, 1983, union negotiator Downey telephoned petitioner asking its intentions with respect to signing or negotiating a new contract and petitioner replied that it did not know what it was going to do until Shappell Industries, its principal customer, decided whether or not to put into effect a dual-gate system. They spoke by phone again on June 30, when Downey asked petitioner if he was going to sign a contract with the union and petitioner replied that it had not heard from Shappell but that petitioner was going to send some employees to the hiring hall so that they could be referred to other jobs.

On June 30, 1983, petitioner was doing a job at Moffett Field and, since his contract with the union expired on that date, the job superintendent advised that petitioner could not finish the job if petitioner was nonsignatory to a union

contract, and a union contractor would have to complete the job. Petitioner made arrangements with a union contractor to complete petitioner's Moffett Field job in the beginning of July 1983 and all of petitioner's employees on the Moffett Field job went to work for the union contractor to whom petitioner had assigned the completion of the Moffett Field job. These five men are named as the discriminatees in the Board action and the other alleged discriminatee, upon being advised that petitioner would not sign a new union contract, obtained a referral from the union hiring hall and went to work for a union employer.

Ken Lorentzen, the union's chief negotiator, admits that he had no contact with petitioner before June 30, 1983, regarding the negotiation of a new contract, his first contact coming at a meeting with petitioner on September 7,

1983 after the contract expired. Meanwhile, on August 9, 1983, Lorentzen authorized the placement of pickets against petitioner on the Shappell job without prior notice to petitioner, stating by said action the union was attempting to bring petitioner to the bargaining table.

It is undisputed that not once did union representative Downey or any other representative, from the time petitioner sent his letters stating he would not be bound past the June 30, 1983 expiration date of his contract with the union, tell petitioner that by operation of law the expired contract continued such that any unilateral changes by petitioner might constitute an unfair labor practice and that by operation of law petitioner was bound to keep in full force and effect the provisions of the expired contract. It is further undisputed that none of the

union officials called petitioner asking to meet where petitioner refused to meet with them.

Victor Peterson testified that when the contract expired on June 30, 1983, it expired, that petitioner had no contract to comply with after it expired, that its new employees asked for certain wage rates and petitioner judged them on their ability and paid them wages negotiated directly with these new nonunion employees and that petitioner also put into effect a new medical plan and an IRA plan for his new employees. With respect to petitioner's good faith belief that it had no contract with the union after its expiration date, trial counsel for the Board in her brief filed with the Administrative Law Judge stated, "Respondents had not presented any defense to this unlawful conduct, relying only on their mistaken beliefs that when

the collective bargaining agreement expired on June 30, their duty to bargain with the union terminated. Respondents' beliefs were in error..."

On July 1, 1983, Peterson stopped paying the wages and benefits set forth in the expired 1980-1983 contract and made no further payments to the union trust funds.

The Board concluded that petitioner violated Section 8(a)(1) by informing his employees in June of 1983 that it would become a nonunion employer; that petitioner violated Section 8(a)(3) by withdrawing recognition from and refusing to bargain with the union since July 1, 1983 and by unilaterally discontinuing and changing wages and benefits provided for in the expired agreement and by dealing directly with the new hirees concerning wages and benefits on and after July 1, 1983; and that petitioner

violated Section 8(a)(3) by constructively discharging his six employees on June 30, 1983.

The Board ordered that petitioner cease and desist from withdrawing recognition and refusing to bargain with the union on and after July 1, 1983, from discouraging membership in the union by constructively discharging employees and from advising employees that petitioner was to be a nonunion employer.

The Board further ordered that petitioner take the following affirmative action ostensibly necessary to effectuate the policies of the Act:

A. Upon request, bargain with the union as the exclusive representative of all employees.

B. Offer Joe Champlin, Bill Rose, Nat Castilleja, Gabe Losada, Al Silva and Armando Silva immediate and full reinstatement to such positions as each

would have been in absent the discrimination against each, or if such position no longer exists, to a substantially equivalent position without prejudice to their seniority and other rights and privileges, and to make each of them, and all employees employed on or after July 1, 1983, whole for loss of pay or other benefits suffered by reason of the discrimination against each in the manner described in the section entitled, "The Remedy." The remedy provided that petitioner's make-whole obligations continue until petitioner and the union bargained to a new agreement or to an impasse.

C. Revoke the unilateral changes instituted on or after July 1 and reinstitute the terms and conditions of the expired 1980-1983 collective bargaining agreement with the union.

D. Pay into the benefit funds provided for in the 1980-1983 contract such sums that would have been paid into the funds on behalf of such employees, absent the illegal unilateral changes.

Petitioner contended first to the National Labor Relations Board and then to the Court of Appeals that the order to pay all of its new nonunion employees hired after July 1, 1983, the wages they would have received under the expired union contract and to pay the union trust funds all benefits for these nonunion hirees that they would have received under the expired agreement until petitioner and the union bargained to a new agreement or to an impasse was a Board order in excess of the Board's remedial authority conferred upon it under 29 U.S.C 160(c), and that such an affirmative order is not a remedial order contemplated by the Act, but rather is

punitive as to petitioner and grants a windfall to the union with no corresponding benefit to petitioner's new nonunion hirees. Petitioner conceded that the Board's order requiring it to offer reinstatement to its former six union employees and to make them whole, including payment of wages to them retroactively and payment into the union trust funds retroactively to July 1, 1983, was a proper order. However, petitioner contended that a bargaining order with respect to his new nonunion hirees, both as to wages and trust fund benefits, would be a sufficient and adequate remedy under the facts of this case such as to effectuate the policies of the Act, one of which is to encourage collective bargaining.

The Court of Appeals affirmed the Board's orders that petitioner pay all his new employees, all nonunion, hired

after July 1, 1983, the wages provided for in the expired contract and that petitioner pay to the union trust funds for these nonunion employees the trust fund payments specified in the expired contract with the union, retroactively and until petitioner reached a new agreement with the union or bargained to an impasse (Memorandum of Decision, page 5).

The Court of Appeals ruled as follows: "the Board's order in this case does no more than has previously been approved by this court. We have enforced orders requiring payment of fringe benefits for newly hired employees, Stone Boat Yard vs. NLRB, 715 F.2d 441 (9th Cir. 1983), Cert. denied, 466 U.S. 937 (1984), retroactive restoration of unilaterally changed wages and benefits, Seattle Auto Glass vs. NLRB, 669 F.2d 1332 (9th Cir. 1982), and back

pay to newly hired replacement employees, Crest Floor and Plastics, Inc. vs. NLRB, 274 NLRB No. 185, enf'd men. 785 F.2d 314 (9th Cir. 1986). The Board's order is well within its authority and discretion." (Memorandum of Decision, page 4, lines 19-26; page 5, lines 1-2)

The foregoing cases relied on by the Court for its decision are all factually different from the case at bench. This is a pivotal point in that none of the cases cited by the Court involved enforcement of Board wage and trust orders for all new nonunion hirees. Thus, the Court really did not address the issue of whether such orders exceed the Board's authority. Those were cited by the Board, distinguished by petitioner in its reply brief, and again in petitioner's Petition for Rehearing filed on November 28, 1986, and later denied. The Court of Appeals has not

really addressed the issue of whether Section 10(c) can be applied to the new nonunion hirees.

Petitioner has contended and does contend that Carpenter Sprinkler Corp. vs. NLRB, 605 F.2d 60 (2nd Cir. 1979) and Section 10(c) of Act precluded the broad affirmative orders involving the new hirees.

In that important case the employer instituted new wage and fringe benefit arrangements after he had withdrawn from the collective bargaining agreement and after it expired. All 19 of the employer's employees went on strike and the employer hired replacements for wages and put into effect new fringe benefits for the new employees. The Board ordered the reinstitution of the expired contract as to wages and required the employer to pay the fringe benefits to the union in accordance with the expired contract.

The Board also ordered that Carpenter continue to bargain with the union and to offer reinstatement to his former employees and pay them for any wages lost as a result of the unilateral changes.

However, the Board went further in Carpenter by making orders affecting the new employees and the Court struck and refused to enforce those orders providing for restitution remedies for the new employees. The Court noted that ordering the reinstitution of the expired contract for the new employees was improper, since the company was given no notice that it might be held for such back payments and that the new hirees were fully aware of the terms on which they were hired and, hence, the order of restitution for the new hirees was not warranted. The Court also noted that retroactive payments to the union funds was also inappropriate, since the order was unclear and since the

order made no allowance for offsetting these retroactive payments with the health and welfare benefits which the employer awarded during the period of time. The Court noted that, given the satisfactory bargaining history of the parties, the changes in the health and welfare benefits should have been the subject of bargaining between the parties and not simply ordered by the Board to be carried out. The Court noted also that the company felt strongly it could not afford the wages and fringe benefits at the level of the expired agreement and could not agree to the terms of the new agreement and, thus, it was unfair to hold the company to previous contract terms which caused it to withdraw from the multi-employer bargaining unit in the first place. The Court concluded that the financially crippling remedial action

of the type ordered by the Board would not be enforced.

The Court of Appeals purported to distinguish the Carpenter case on the basis that in that case there had been two bargaining sessions, a strike and the belief by the company that an impasse had been reached, and that none of those factors were present in the case at bar. Petitioner respectfully disagrees with the Court's conclusion that Carpenter is not applicable. Petitioner's job site was picketed by the union in August of 1983. Petitioner had withdrawn from the association because it could not survive under the terms of the expiring contract and it believed that when it expired it had no contract to live up to. The union did not advise that petitioner was incorrect in that assumption and that unilateral changes are an unfair labor practice.

Petitioner respectfully submits that Carpenter properly denied enforcement of orders extended to employees who were employed after the bargaining agreement expired and that the Court should apply that case to deny enforcement in this case. The resolution of the issue is important so that small companies, such as petitioner, may be made aware of the proper scope of the Board's remedial authority with respect to new hirees.

REASONS FOR GRANTING THE WRIT

I. THE NATIONAL LABOR RELATIONS BOARD'S ORDER CONTRAVENES THE NATIONAL LABOR RELATIONS ACT POLICY EXPRESSED BY CONGRESS AND IT IS, TO THAT EXTENT, AN INVALID ORDER.

The Board's broad authorization under the National Labor Relations Act to make orders only to the extent that they "can fairly be said to effectuate the

policies of the Act," does not confer absolute power on the Board to make any order. While courts, including the Supreme Court, have indeed been reluctant to disturb the rather free reins of the Board, particularly in the area of remedial authority, NLRB vs. 7-Up Bottling Co., 344 U.S. 344, 346, 31 LRRM 2237, 2238 (1953); Amalgamated Local Union 355 vs. NLRB, 481 F.2d 996, 1006, 83 LRRM 2849, 2857 (2d Cir. 1973), the exercise of such broad powers has not been allowed to go unchecked. Rather, it can and it is measured against the Congressional policy or declaration of the purpose of the Act expressed in Section 1 of that Act. That policy envisions and mandates the accomplishment of three primary objectives: (a) free collective bargaining, (b) free choice in the selection of bargaining representatives and (c) freedom to engage

in, or refrain from, concerted activities for the mutual aid and protection of the employees. In order "to pass muster," so to speak, the Board's orders must be consonant with such objectives. Board's remedies which either fail to fall within or which conflict with any one of the said statutory directives, Consolidated Edison Co. of New York vs. NLRB, 305 U.S. 197, 3 LRRM 645 (1938), or which are punitive or confiscatory, Local 60 Carpenters vs. NLRB, 365 U.S. 651, 655, have been invalidated as serving no statutory purpose. Republic Steel Corp. vs. NLRB, 311 U.S. 7, 9-11, 7 LRRM 287, 289 (1940).

It is essential to examine some of the orders made in this case against such a backdrop in order to vindicate petitioner's steadfast position that (a) the Board's broad and undefined application of Section 10(c) of the Act

to current employees (i) violates one or more of the statutory objectives, (ii) violates the due process and equal protection of the laws rights of the new employees, in addition to violating the constitutional principle of separation of powers, (iii) punishes the employer rather than make the employees "whole," and (iv) unjustly enriches a union that does not come to the bargaining table with "clean hands" in failing to warn petitioner of the continued application of the terms of the collective bargaining agreement beyond its expiration date.

II. CONGRESS DID NOT INTEND THAT SECTION 10(c) BE APPLIED TO PETITIONER'S CURRENT EMPLOYEES.

Section 10(c) of the Act confers on the Board the power to award "affirmative action" to the aggrieved, including "reinstatement" of employees with or without pay and further including back

pay for such "reinstated" aggrieved employees.

The Board's orders in this case affect two classes of employees: (a) employees who were union members while employed by petitioner until June 30, 1983, the date upon which the collective bargaining agreement in question terminated and the date on which, as a result of subcontracting of a job, those employees left petitioner's employment to become employed by a subcontracting union employer. Petitioner does not object to the orders as they apply to such a class. The orders, however, are made equally applicable to (b) employees who sought and found employment with petitioner after June 30, 1983, at a time when petitioner believed, in good faith, to have become a nonunion employer and at a time when these new employees had no reason to believe other than that they

were being employed by a nonunion employer. It is as to this class of employees ("new employees" or "current employees" as opposed to the "old employees") that petitioner challenges the Board's orders.

The first such challenge is that it is clear from the language of Section 10(c) that the statutorily granted remedial authority to the Board is intended to be made applicable to those who were employed at the time of the unfair labor practice and who suffered from the resulting discrimination. Clearly, the remedy of "reinstatement," be it with or without pay or accompanied by back pay, was intended to apply to the "old employees," that is, those six who were in petitioner's employment until June 30, 1983, and who left his employ on or before that date as a result of petitioner's mistaken belief that the

company was free of the expired collective bargaining agreements. Those are the only ones who left and who could, therefore, be "reinstated."

"Make-whole" orders of the nature involved in this case, while authorized and long approved, Phelps Dodge Corp. vs. NLRB, 313 U.S. 177, 194, 8 LRRM 439, 446; Virginia Electric & Power Co. vs. NLRB, 319 U.S. 533, 541, 12 LRRM 439, 446; are, nonetheless, considered to be extraordinary remedies. In fact, Congress saw fit to carve it out of the generic "affirmative action," thereby evidencing the intent to treat "reinstatement" with more detail and precision.

The application of those provisions to the "current employees" does not represent the exercise of statutorily granted authority to effectuate the policies of the Act; rather, it

constitutes legislative grafting by a body with no authority to do so. To the extent, therefore, that the orders require a payment of back pay and payments to the union trust funds, the orders are void.

III. THE BOARD'S ORDERS, AS EXTENDED TO THE CURRENT EMPLOYEES, ARE VOID IN THAT THEY ARE VIOLATIVE OF ONE OR MORE OF THE CONGRESSIONALLY STATED OBJECTIVES OF THE NATIONAL LABOR RELATIONS ACT AND ARE FURTHER VIOLATIVE OF THE U. S. CONSTITUTION IN SEVERAL RESPECTS.

It is best to address the constitutional infirmities of the orders to show, somewhat more transparently, the clash between the objected orders and the stated objectives of the Act.

A. Violation of Due Process and of Equal Protection of the Laws.

Sections 7, 8 and 9 and other pertinent provisions of the Act provide for orderly procedures with respect to the selection of the appropriate bargaining units, representative election procedures, review of representative proceedings. Pivotal, among the many questions in all of this is hte fact that existing employees are given the opportunity to express themselves on such important issues as "agency shop" and "closed or union shop." NLRB vs. General Motors Corp., 373 U.S. 734, 83 S.Ct. 1453 (1963).

Prior to the expiration of the collective bargaining agreement in question, on June 30, 1983, Peterson

Painting Co. was a closed or union shop. The Board's orders restoring the employer, employees and union to June 30, 1983, would have the effect of subjecting the current employees to the restrictions of a closed shop without having had an opportunity to have participated at all in any of the processes. Such employees are now met by the single and rather final choice of either joining the closed shop employer or ending their employment. As union members, they would be required to pay, among other things, initiation fees and dues. Hence, their choice is between being compelled to union membership with its attendant payment of fees and dues or to employment termination. No matter which way these current employees go, their property rights will be

adversely affected without having been offered not even the most rudimentary requirements of due process of law guaranteed to them under the Fifth and Fourteenth Amendments to the U. S. Constitution.

Moreover, inasmuch as the closed shop is being imposed upon them as a "fait accompli" or by judicial fiat, they are thrust in a position that is quite different from the "old employees" and from those employees who elect to seek or not to seek employment with a closed shop employer. The old employees had the opportunity to participate and to vote on union and collective bargaining matters affecting them; a prospective new employee has the opportunity, either at or prior to accepting employment or within

7 days thereafter, to elect whether he or she wishes to become an employee of a closed shop employer. The current employees of Peterson Painting have none of these choices available to them. Their only choice is to join and contribute money to the union or to suffer the pain of termination of employment. That "choice" contravenes both the statutory objectives of the Act and the Constitution inasmuch as it impels invidious discrimination against the current employees without any rational basis therefor, in violation of the Fifth and Fourteenth Amendments to the U. S. Constitution.

Hence, to the extent that the orders are made applicable to current employees, they are void as violative of one or more of the

objectives of the Act, H. K. Porter Co. vs. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970), and they are violative of the constitutional rights of the employees.

B. Violation of Fundamental Rights to Agree.

"The Board's remedial powers under Section 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the party's freedom of contract is not absolute under the Act...allowing the Board to compel agreement when the parties are unable to agree would violate the fundamental premise upon which the Act is based--private bargaining under governmental supervision of the procedure alone, without any

official compulsion over the actual terms of the contract." H. K. Porter Co. vs. NLRB, 397 U.S. 99, 73 LRRM 2561 (1970). Such freedom of contract is no less applicable to the employee's own right to contract advantageously with a nonunion employer and to have such a contract be free from abridgment by retroactive orders of the Board.

In the Brief for the National Labor Relations Board in Support of Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board filed with the United States Court of Appeals, at pages 7 and 8, counsel for the Board acknowledges that the wages paid by petitioner to some of the current employees were greater than those

petitioner would have been required to pay under the collective bargaining agreement that the Painting and Decorating Contractors Association made with the union after Peterson's withdrawal from this association. It is clear, therefore, that at least some of the current employees will be adversely affected in that at least some of them would receive lesser pay for the same work and would, further, have to pay union fees and dues which would further reduce their compensation.

All of the foregoing would be happening to the current employees without, so far, their having had any opportunity to be heard at <u>any level</u>--administrative, judicial or otherwise.

It can hardly be argued that the interests of the union and of the current employees are consistent. They are patently not. The once widely held belief that the interests of the union were synonymous with those of the employees it represented has been shed. Steele vs. Louisville and Nashville R. Co., 323 U.S. 192, 65 S.Ct. 226.

In this case, the union, the employer and the Board have all endeavored "to do right"; unquestionably, in extending the orders made herein to the current employees, the Board thought to be acting for their benefit. As it turns out, the Board has unwittingly denied such employees valuable rights under the Act, as well as under the U. S. Constitution. For

all such reasons, the orders, as applied to them, ought to be set aside as being both in excess of the Board's remedial authority and as being unconstitutional.

IV. THE ORDERS OF THE BOARD EXCEED ITS REMEDIAL AUTHORITY TO THE EXTENT THAT THEY HAVE PENAL OR CONFISCATORY EFFECTS.

The so-called "make-whole" orders made in this case require payment of back pay and of other benefits and payments into the union benefits funds. Again, such orders are extended to all, that is, to the old as well as to the current employees.

In making the orders restoring the union and the employer to their respective positions on June 30, 1983, the last day of the expiring collective bargaining agreement, the Board has created a fiction that clashes severely

with the reality of the circumstances prevailing.

Counsel for the Board seems to acknowledge that the orders do not really subject the parties and the current employees to the agreement itself; counsel advances the position that only the terms and conditions of the collective bargaining agreement expiring on June 30, 1983 are applicable.(Opposition of the National Labor Relations Board to the Company's Motion for a Stay of Mandate, pages 4 and 5). Assuming, arguendo, that such is the case, the orders patently raise the specter of two other impermissible infirmities, that is, those of: (a) unjust enrichment or windfall to the union and to the members of such union totally unrelated to petitioner and to its current employees and (b) penal damages to the employer.

Payment of back pay inures to the direct benefit of the employees; hence, it does not have the same effect as the benefits payments required to be made by petitioner to the union benefit funds. While the latter payments will serve to build up union funds, it is apparent that none of the current employees may receive any of the benefits from those funds.

Current employees are not now nor have they been members of such a union since the beginning of their employment with petitioner. While negotiations between petitioner and the union could lead to a collective bargaining agreement, such negotiations could also lead to an impasse. In either event, current employees might never become members of the union and become thereby entitled to some of the benefits for which petitioner is being made to pay now. If a collective bargaining

agreement is reached, it is possible that some current employees could elect to end employment rather than to join a union closed shop. If a collective bargaining agreement is not reached in good faith negotiations ultimately leading to impasse, petitioner will become free of the last vestiges of the last collective bargaining agreement that expired on June 30, 1983; in such an event, none of the current employees will likely become members of the union.

The record is devoid of any evidence that allows nonunion members to receive benefits under the union's trust funds. Indeed, if it did, there would be suits by union members for illegal dissipation of their funds inasmuch as 29 USCA §186, which governs restrictions on financial transactions, requires that money paid to a trust fund be for "the sole and

exclusive benefit of the employees...and their families." (29 USCA §186(c)).

Clearly, therefore, to the extent that contributions being required to be made to the benefits funds do not and may not ever inure to the benefit of current employees, they are penal and imposed "to achieve ends other than those which can thoroughly be said to effectuate the policies of the Act." Virginia Electric and Power Co. vs. NLRB, 319 U.S. 533, 540, 12 LRRM 739, 743.

As such, they are void since the power to command affirmative action is remedial and not punitive, and the Board, therefore, is not free to set up any system of penalties that it deems appropriate in derogation of or without regard to the objectives of the Act. Republic Steel Corp. vs. NLRB, 311 U.S. 7, 9-11, 7 LRRM 287, 289 (1940).

Hence, counsel for the Board, having conceded that the petitioner's current employees are not union members and there being nothing in the evidentiary record to show the flow of any benefits from the union benefits trust funds to petitioner's current employees, whether extended retroactively or otherwise, any payments made by petitioner to said funds for the current employees constitute an impermissible penalty that must be set aside as void.

CONCLUSION

In that the "make-whole" orders, particularly with respect to the mandate to pay, retroactively, to the union benefits funds and as extended to the current employees of petitioner, are void for being (a) in excess of the remedial authority granted by Congress to the Board by Section 10(c); (b) in violation

of one or more of the stated objectives of the Act; (c) in violation of the due process and equal protection of the laws guaranteed by the Fifth and Fourteenth Amendments; (d) in violation of the constitutional principle of separation of powers; and (e) in further violation of the Act in imposing penal and confiscatory assessments against petitioner, it is respectfully requested that the herein Petition for Writ of Certiorari be granted.

Respectfully submitted,

EDWARD R. LA CROIX, SR.
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel of Record

LA CROIX, SCHUMB,
SANGUINETTI & KELLER
1530 Meridian Avenue
Suite 150
San Jose, CA 95125
(408) 264-5430
Counsel for Petitioner

March 17, 1987